In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 36

UNITED STATES OF AMERICA, APPELLANT

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO REMAND

On February 14, 1964, less than three weeks before this case was scheduled for oral argument and eight months after probable jurisdiction was noted, the appellees filed a motion to remand to the district court to take additional evidence and make additional findings on two issues: (1) "competition between local banks since the trial of this action," and (2) "problems of divestiture created by operating the consolidated bank as a single institution" since the merger. Appellees urge this Court to defer deciding the case until the record has been thus supplemented (Motion,

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p. 2). The additional evidence relating to competition is designed to show that since the trial (a) the merged bank's percentage of total bank assets and deposits in Fayette County has declined slightly (from 51.51 percent to 50.58 percent, and from 50.44 percent to 49.66 percent, respectively), although the dollar volume of its assets and deposits had increased by more than $20 million each (PX 35, R. 1053; Motion, pp. 4, 17); (b) that the market shares, in terms of assets and deposits, of two of the four other banks in the area have grown, while those of the other two banks have declined (Motion, p. 17); and (c) that Fayette County has continued to grow industrially (Motion, p. 7).

This motion should be summarily denied because (1) the additional evidence relating to competition is merely cumulative and could not affect the outcome of the case; and (2) there is no occasion to consider problems of divestiture at this stage, since they will arise only if and when this Court decides that the merger violates the Sherman Act.

1. This case was tried in the latter part of February 1962, approximately one year after the merger took place on March 1, 1961. The lengthy record before this Court comprises 1254 printed pages, and includes detailed information covering every aspect of the merger. It includes statistics on the operations of all the banks in Fayette County for many years, including the full year 1961, for the last ten months of which First National and Security Trust were a single institution. The record shows that in 1961 First Security's share of the market in terms of assets and

deposits had declined from 52.7 percent to 51.51 percent, and from 51.94 percent to 50.44 percent, respectively (DX 35, R. 1053)—a slightly greater decrease than that to which appellees point for the 18-month period from January 1, 1962, to June 29, 1963 (Motion, p. 4). The record also indicates that some attrition in a bank's business normally follows a merger, and that the merged bank apparently anticipated it (R. 366, 566, 574, 584, 630), and that until the legality of the merger finally is determined, the merged bank will not be able fully to develop its potentialities (R. 294, 357, 507, 510, 522, 525, 535, 630; PX 129, R. 941). The record in this case thus contains full information on every aspect of the merger, including evidence as to post-merger changes in market shares. Only extraordinary circumstances could possibly justify reopening the record at this late date.

None of the material with which appellees propose to augment the record comes even close to justifying reopening. Inevitably, there will be shifts in the market position of the merging companies and their competitors. Business is never static, and it was anticipated that after the merger First Security's share of the market would decline slightly. But evidence of such decline is already in the record. Additional evidence that there has been a small further decline for the period after the trial has little, if any, probative value in determining the basic question whether the combination of the largest and fourth largest banks in the area, which together have approximately 50 percent of the market and are three times larger

than the next largest bank, violates the Sherman Act. Moreover, the presidents of three of the four other banks in the County acknowledged that in the year since the merger they had not yet experienced any demonstrable competitive disadvantage from the merged bank's economic power (R. 245, 291, 319); their concern was with the long range effect of such power, not its immediate short-term consequence (R. 243, 249, 294, 329). The record before the Court as it stands affords a fully adequate basis upon which this Court can, and should, determine the validity of the merger.

In every merger case where the merger has been consummated—and, indeed, in many other antitrust cases as well—supplementing the record two years after the trial might throw some additional light on the economic effects of the challenged transaction or practice. But whatever might be the aid of such material to the courts in deciding antitrust cases,[1] there is a far more compelling countervailing consideration. There must be an end to litigation, and in these cases the end to receiving evidence comes when

[1] Except in the unusual case where "the structure of the market has changed radically since the merger," changes in the merging company's post-acquisition share of the market are entitled to little, if any, significance, since the merging company "so long as the merger is the subject of an investigation or proceeding, may deliberately refrain from anti-competitive conduct—may sheathe, as it were, the market power conferred by the merger—and build, instead, a record of good behavior to be used in rebuttal in the proceeding." *The Procter & Gamble Company*, Federal Trade Commission Docket No. 6901, decided November 26, 1963, mimeographed opinion, p. 38 (Commissioner Elman).

the record in the trial court is closed. Nothing that the appellees propose to present offers the slightest justification for reopening this record two years after it was closed.

2. The violation charged in this case is an illegal combination of two banks. It would seem obvious that, if the combination is illegal, the only way to cure the illegality is to end the combination. "Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control" (*United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 329). It was for this reason that in our brief (p. 56) we requested a remand "with directions that the court enter a judgment of divestiture." Indeed, at the hearing on the government's motion for a preliminary injunction both the district court and the appellees themselves apparently recognized and anticipated that we would be entitled to such relief if we prevailed on the merits. The district court stated (R. 43; see also, R. 41–42):

> These people [appellees] have had ample notice that [the government's] suit has been filed. They have had ample notice of what the results may be if they continue to carry out a so-called merger. They would have to stand the damage that would be occasioned by having to make a segregation of all assets that are commingled.

Similarly, appellees stated (R. 77):

> * * * we recognize the possibility that at the end of litigation we may have to restore these banks to their former status and we recognize that for our own protection we must do every-

thing that we can to keep the assets segregated and identifiable so they can be restored. That we expect to do.

We recognize, of course, that divestiture after the merging banks have been operated as a single entity for three years undoubtedly will pose difficult—although not insoluble—problems. Indeed, it was because of these problems that we sought to prevent further consummation of the merger (R. 23–33). But these problems relate to the form and method of divestiture, not to the need for it. At no point in appellees' lengthy presentation on this point is there any proposal for, or even suggestion of, an alternative remedy that would be equally effective to cure the violation. Indeed, under appellees' theory, the further delay which their proposed remand would entail, with the resulting further commingling of their assets, would itself be a further argument against divestiture. What appellees really seem to be seeking is a ruling that, because divestiture would be difficult, there should be no relief even if this Court holds the merger illegal.

Questions as to the scope and form of relief are, in the first instance, for the district court to decide. By the same token, however, there is no occasion for that court, having dismissed the complaint, to consider those issues unless and until this Court has decided that the merger is illegal. We continue to urge that divestiture here is the only appropriate remedy and that a remand so directing is proper. But we would not object if this Court, in order to give the district court an opportunity to con-

sider whether some other relief would be equally effective to cure the violation, were to frame its remand in broader terms, *i.e.*, a remand for the entry of an appropriate degree in accordance with the Court's opinion.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

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